

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1067

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BS

DOCKET NO. 77-1067

UNITED STATES OF AMERICA,

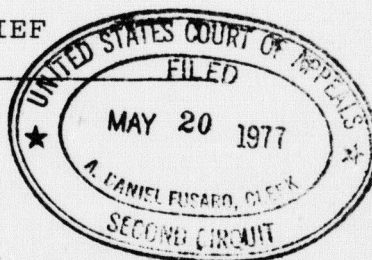
Appellee,

VS.

MAURICE BURSE,

Appellant.

APPELLANT'S REPLY BRIEF



R. WILLIAM STEPHENS
Attorney for Appellant
10 Lafayette Square
Buffalo, New York 14203
Tel.: (716) 852-7587

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STATEMENT

The Supreme Court of the United States has in a number of recent cases granted certiorari and made rulings involving the double jeopardy clause of the Constitution of the United States. See e.g. United States v. Jorn, 400 U.S. 470 (1971); United States v. Dinitz, 424 U.S. 600 (1976) and United States v. Martin Linen Supply Co.,

_____ U.S. _____ 45 U.S. Law Week 4337 (April 4, 1977).

The cavalier treatment given the serious Constitutional questions in this case by the Government's brief invites this reply.

The factual statement set forth in our main brief, was presented not to challenge the legal sufficiency of the evidence, but to show how close the case was and to distinguish those cases where error of one kind or another is insufficient for reversal because of overwhelming proof of guilt. The Government's factual statement contained in its brief at pages 2 through 7 is completely irrelevant.* We are left then with 6 short pages of the Government's brief which attempt to explain the Constitutional basis for using the same proof in both trials after the defendant had been acquitted on the substantive counts of bank robbery; the reason why the Government is able to retry the defendant inspite of prosecutorial misconduct as further found by this Court on the first appeal, and the propriety of the instruction to the jurors that the minority only should reconsider their viewpoint.

* A substantial part of what the Government calls "corroboration" is only evidence which corroborates that DeBose robbed the bank, aided by Green. This was never in dispute.

Perhaps it would be helpful to state unequivocally at the outset what the defendant is not claiming on this appeal.

The defendant does not claim that after a conviction and a reversal by an Appellate Court, the double jeopardy clause prevents his retrial for the crime for which he was convicted. The defendant claims only that when the reason for the first conviction is "prosecutorial impropriety designed to avoid an acquittal" or "circumstances . . . attributable to prosecutorial . . . overreaching", United States v. Jorn, 400 U.S. at 485 and Footnote 12 (1971), retrial is barred. As stated in United States v. Kessler, 530 F. 2d 1246 at 1255-6 (5th Cir. 1976):

"Where 'prosecutorial overreaching' is present, the interests protected by the Double Jeopardy Clause outweigh the public interest in conducting a second trial ending in acquittal or conviction."

Even putting this aside, Ashe v. Swenson, 397 U.S. 436 (1970) prevents the Government from introducing at the second trial, evidence which was used in the first trial to support a conviction on a count on which the defendant was acquitted.

The defendant does not claim that conspiracy to violate the Federal Bank Robbery Law is the same crime as the substantive crimes of bank robbery. The defendant claims only that after an acquittal on the counts charging substantive crimes of bank robbery, the Government cannot introduce evidence in the conspiracy charge that he committed the substantive crimes.

Finally, the defendant does not claim that in each and every instance, where a trial judge gives a supplementary instruction to the jurors, that the minority should reconsider their viewpoint, it constitutes in itself reversible error, but only that in the circumstances of this case "where the jury could easily have voted up or down on the evidence presented here" (Judge Curtin's evaluation of the evidence quoted at Government's Brief p. 12)* such an instruction prejudiced the defendant.

* The Government quotes Judge Curtin and then states that this shows it was "not an unduly difficult case to decide". On the contrary, it is precisely because the jury could have voted either way that this presented a most difficult case to decide.

POINT I

Ashe v. Swenson Prohibits The
Government From Using Proof That
The Defendant Committed The Sub-
stantive Crimes Of Bank Robbery
In Attempting To Secure A Conviction
Of Conspiracy.

Attempting to follow the suggestion of John W. Davis to "go for the jugular", we refer the court to the Government's justification for using on the retrial, evidence of the defendant Burse's alleged participation in substantive bank robbery offenses. We refer the court to the Government's explanation at the bottom of page 9 and the top of page 10 of its brief, keeping in mind that the defendant Burse was acquitted of substantive bank robbery offenses, charging violations of 18 U.S.C. §2113(a) and §2113(b). The Government infers that the defendant is claiming that the offenses are the same, which is not so. At the top of page 10, the Government focuses on the fact that the defendant was convicted of conspiracy at the first trial. This completely misses the double jeopardy point! The defendant was acquitted of the substantive bank robbery charges. Under Ashe v. Swenson the Government on retrial, could present proof that the defendant entered into an agreement to violate the law in support of its

proof of the crime of conspiracy, but was foreclosed by the acquittal from presenting evidence that the defendant committed substantive bank robbery crimes. The Government should not have been allowed to have its principal witness DeBose testify that Burse robbed the bank with him. The jury had necessarily found that this was not so by acquitting him of the substantive bank robbery charges.

The Government cites this Court's recent decision in United States v. Calla, 521 F. 2d 605 (2d Cir. 1975) which succinctly presents the issue involved in this case.

There this Court stated:

"Had the Government introduced evidence at the California trial [first trial] of Calla's earlier complicity, which formed the basis of his later trial in New York, we would have been faced with a much more difficult question. As the record stands, however, the Government lacking this evidence, focused almost entirely on proof of his later conduct just prior to his August 9th arrest. For present purposes the significant fact is that the second trial did not amount to a renash of the evidence presented at the first trial, but was devoted to proof of a different crime involving evidence." (Emphasis supplied)

In Calla, the first trial concerned Calla's activities on August 9, 1972 resulting in his acquittal for possession of counterfeit currency. The second trial, however, charging him with conspiracy and transferring counterfeit money, focused on the period July 2nd to August 3rd, 1972. 521 F. 2d at 606.

In this case, both trials involved themselves with Burse's activities on July 29th and July 30th, 1974. In both trials the Government presented evidence that Burse entered the bank with DeBose and participated in the bank robbery itself.

Ashe v. Swenson prohibits the Government, from using at the second trial, evidence of a fact which was necessarily determined otherwise in the first and in this case prohibits the Government from proving at the second conspiracy trial, that Burse had engaged in substantive bank robbery offenses on which he had been acquitted at the first trial.

On this point alone the conviction must be reversed and the defendant accorded a new trial.

PCINT II

The Fact That There Was A Conviction
At The First Trial Rather Than A
Granting Of Defendant's Mistrial Motion
Does Not Foreclose Defendant's Claim
That The Prosecution Is Barred By The
Double Jeopardy Clause.

The Government concedes that where there is prosecutorial misconduct at the first trial, the double jeopardy clause is available to a defendant when the mistrial is declared (Government Brief p.7). In Kessler, supra, a mistrial was declared at the urging of the defendants and reprosecution was barred. Here, at the first trial, the defendant promptly moved for a mistrial after the summation, which motion was denied by the trial court. On appeal, this Court reversed, found that the Government engaged in prosecutorial misconduct, listed the instances in its opinion in subsections (a) through (h), [531 F. 2d at 1154] and by so doing determined, in effect, that the trial court should have granted the mistrial motion and avoided the necessity for the appeal. Under Kessler, supra and United States v. Dinitz, 424 U.S. 600 (1976), the defendant can rely on the double jeopardy clause to bar his reprosecution where the mistrial has been declared. It certainly stands the law on its head

to say that the defendant has the double jeopardy protection available to him when the mistrial is declared at his request, but does not where his mistrial motion is denied and he must seek appellate relief for the prosecutorial misconduct. It is the prosecutorial misconduct which overrides the policy reasons for a new trial, not the irrelevant fact of whether or not the mistrial was declared. The Government having engaged in prosecutorial misconduct at the first trial, policy reasons require that reprosecution be barred by the double jeopardy clause.

There is another reason why the court should not exhalt form over substance by making the declaration of a mistrial a prerequisite for double jeopardy protection. If the defendant only has such protection when a mistrial is declared for prosecutorial misconduct, trial courts will be reluctant to grant such motions. As a result, already overcrowded appellate calendars will be further burdened.

POINT III

The Identification Testimony, Or
Lack Of It By Anna DeBose, Is Not
Precluded From Relitigation By
This Court's Prior Decision.

The Government tells us that the defendant cannot raise the question of the lack of an independent basis for the identification testimony of Anna DeBose because of this Court's prior decision calling it "the law of the case". This is not so and the cases cited by the Government do not stand for the proposition upon which it seeks to rely. Even if it does, then the prior ruling of this Court that the Government engaged in "prosecutorial misconduct" is the "law of the case" and cannot be questioned by the Government on the defendant's double jeopardy claims.

POINT IV

In The Circumstances Of This
Case The Allen Charge Should
Not Have Been Given.

We rely on this Court to examine the charge of the trial court to the jury that the minority only should reconsider their view in a case where the evidence pointed in both directions

to the extent that the trial judge stated that "the jury could easily have voted up or down on the evidence presented here". The Allen Charge in the circumstances of this case, prejudiced the defendant. He was entitled to the benefit of the doubt of even a minority of jurors that he had engaged in the conspiracy charged. "Gallop Poll" justice* in a close case should not be a part of our judicial system. The conviction must be reversed in any event on the grounds stated above and this case affords the court an opportunity in this circuit in the exercise of its supervisory powers, to see that the trial courts do not in the future, exhort the minority only to reconsider their views.

Final Statement

We stated in our main brief that the retrial of this case was an "instant replay" of the first trial. Generally, this is true and we stand by such statement. The second trial, however, differed from the first in one important respect. At the first trial, Darrell DeBose testified that the defendant Burse was inside the bank standing in a direct line with the bank surveillance camera at the time the teller removed the bait money, activating the camera. There was no

* United States v. DeStefano, 476 F. 2d 324 at 334 (7th Cir. 1973).

testimony of any other witness concerning the presence or absence of any other person involved in the bank robbery at that time. The bank surveillance photographs which were displayed to the jury at the first trial, showed that the defendant Burse was not depicted in any photographs and had he been where the principal witness against him testified his picture would have been on the photograph. It was on this evidence that the defendant relied in summing up to the jury, saying that if DeBose was telling the truth, Burse's picture would have been on the film taken by the camera. The Government had no explanation for the discrepancy. The film showed its principal witness to be not truthful according to the physical evidence presented. It was at this point that the Government engaged in the prosecutorial misconduct found by this Court on the first appeal in its summation. In short, the Government case was going down the drain and a conviction could only be secured by unique efforts even though improper.

After the reversal for among other things, prosecutorial misconduct, the Government presented the same evidence, but with an additional witness, one Frank Desmore, a bank employee (see Government Brief p. 5). Desmore testified that there was another black male that he observed standing between the double doors on the Wilkes-Barre exit of the bank (Trial Transcript

p. 81).*

It is the position of the defendant that the Government, seeing its case was "less than airtight" United States v. Robinson, 544 F. 2d 611 (2d Cir. 1976) and having failed to present an explanation for the lack of defendant Burse's picture on the bank's surveillance film, attempted to secure a conviction by prosecutorial misconduct so that even in the event such conviction were reversed, it could retry the case with the presentation of the testimony of witness Desmore to explain the discrepancy.

The effect of this was to allow the Government, because of the misconduct of its representative, to obtain "at a trial in which its case was going badly, . . . another, more favorable opportunity to convict the accused". Gori v. United States, 367 U.S. 364 at 369 (1961).

Respectfully submitted,

R. WILLIAM STEPHENS
Attorney for Appellant
10 Lafayette Square
Buffalo, New York 14203
Tel.: (716) 852-7587

* The bank surveillance camera would not photograph someone standing between the double doors (81). See Government Exhibit 10.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
 : SS.:
COUNTY OF ERIE)

MARY ANN BATTAGLIA, being duly sworn, deposes and says that she resides at 40 Stillwell Avenue, Kenmore, New York 14217 and is over the age of 21; that on the 19th day of May, 1977, she served a copy of the annexed Appellant's Reply Brief upon the United States Attorney, attorney for the appellee in the within entitled action, by depositing a true copy of same properly inclosed in a postpaid wrapper in a Post Office box regularly maintained by the United States Government at 10 Lafayette Square, Buffalo, New York directed as follows:

United States Attorney
United States District Court
Western District of New York
United States Courthouse
Buffalo, New York 14202
Attn: Roger P. Williams, Esq.

that being the address designated by them for that purpose upon the preceding papers in this action.

Mary Ann Battaglia
MARY ANN BATTAGLIA

Sworn to before me this
19th day of May, 1977

William Stephens
Notary Public

R. WILLIAM STEPHENS
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1978